UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ATIONAL LABOR RELATIONS BOARD, Petitioner, v. ONOLULU STAR-BULLETIN, INC., nd ADVERTISER PUBLISHING CO., TD., d/b/a HAWAII NEWSPAPER PERATORS, Respondent.	No. 20894 On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR HAWAII NEWSPAPER OPERATORS, RESPONDENT

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TABLE OF CONTENTS

INDEX OF CITATIONS

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JURISDICTIONAL STATEMENT

The National Labor Relations Board has petitioned this Court for enforcement of its order, issued on June 29, 1965, against Respondent in the case of Honolulu Star-Bulletin, Inc., et al, 153 NLRB No. 83 (R. 11-25, 30-31).[1/] This Court's

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1/ References designated R. are to Volume I of the record. References designated Tr. are to the Official Report of Proceedings before the Trial Examiner, reproduced in Volume II of the record. References designated "Resp. Exh." or "G.C. Exh." are to exhibits of the Respondent and General Counsel, respectively. References designated "Pet. Br." are to the Brief of the General Counsel before this Court.

jurisdiction over this matter is founded upon Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, et. seq.).

STATEMENT OF THE CASE

1. Introduction

The National Labor Relations Board found that Respondent has, since January 2, 1964 breached its duty under Sections 8(a) (5) and (1), and 8(d), of the National Labor Relation Act, to bargain in good faith with the Union over the reinstitution of old bonus plans and the formulation of new ones. This unfair labor practice charge results from the following facts.

2. The Pre-Consolidation Contracts

Prior to June 1, 1962, the two Honolulu newspapers, the Advertiser and the Star-Bulletin, operated independently. The Honolulu Advertiser was published in the afternoon and the Star-Bulletin as a morning daily (Tr. 22-23). Both papers had separate collective bargaining agreements with the various newspaper unions, including the charging party, Hawaii Newspaper Guild, Local 117 (hereinafter called the Union).

Under the 1961 Star-Bulletin contract (Resp. Exh. 4) the Guild members enjoyed significant benefits not available to their counterparts employed by the Advertiser (Tr.94). However, in one respect some Advertiser Guild members were more fortunate; as an added measure of their compensation, the advertising salesmen were paid as much as ten per cent (10%) of their monthly wages through the operation of a Quarterly Bonus Plan which continued in effect from 1957 through June, 1962, the termination date of the Advertiser's separate operation (Tr. 35-36, 93, 102-103). At the Star-Bulletin, on the other hand, there was no fixed bonus for advertising salesmen. Bonus plans were instituted and discontinued according to business needs perceived by various advertising directors (Tr. 34-36, 92). These plans varied in amounts, form and purpose and thus were not a predictable part of the advertising salesmen's income.

In light of these differing practices, the collective bargaining agreements of the two papers treated bonuses differently. Both the 1961 Star-Bulletin and the Advertiser contracts contained a "minimum" salary schedule for Guild-represented employees, but both contracts also recognized the right of the employer and the individual employee to bargain for salary increases above the agreed-upon minimums as well as the employer's

right to pay amounts in excess of the minimum. Thus, the 1961 Advertiser contract contained the following clause:

> Section 26(c) "Nothing in this agreement shall prevent employees from bargaining individually for salary increases above the minimum established herein, nor shall any provision herein limit the right of the Publisher to pay amounts in excess of the minimums set forth herein."

The 1961 Star-Bulletin contract (Resp. Exh. 4, p. 7) included similar language:

> Section 12(b) "Nothing in this agreement shall prevent employees from bargaining individually for salary increases in excess of the minimum established herein."
>
> "Nothing in this agreement shall limit the right of the Publisher, at its discretion, to pay amounts in excess of the salaries set forth above." (Exhibit A, to Respondent's Exhibit 4, page 6)

Presumably because at the time of the execution of the contracts employees were receiving salaries in excess of the minimums, the contracts also included a provision whereby these employees were partially protected against a reduction of their compensation. The Advertiser's contract read:

> Section 26(b) "There shall be no reduction in the present salary of any employee covered by this agreement. The term 'present salary' is understood to mean the straight time rate and does not include any payments for overtime or any other extra payments."

page 5

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The counterpart clause in the Star-Bulletin contract was almost identical, with the exception that it specifically excluded the word bonus from the definition of present salary:

> Section 12(a) "There shall be no reduction in the present salary of any employee covered by this agreement. The term 'present salary' is understood to mean the straight time weekly salary being paid for a work week of forty (40) hours and does not include any payments for overtime or bonus or any other extra payments."

Section 12(a) of the Star-Bulletin contract (Resp. Exh. 4) first appeared in 1956 (Tr. 96); although no company or Union witness could testify as to the history of the 1950 negotiations, Mr. Frederick Drasher, who had been director of personnel and industrial relations of the Star-Bulletin from 1959 (Tr. 87), testified that the purpose of excluding the word "bonus" from the definition of present salary in Section 12(a) was to avoid the difficulty of negotiating bonus plans which involve many variables connected with temporary management needs (Tr. 104-105). Union President Kruse claimed the exclusion of "bonus" from the definition was insignificant (Tr. 44-45).

C. The 1962 Consolidation

On June 1, 1961, the two papers pooled certain facilities in order to realize efficiencies in mechanical, production,

page 5 & 6

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circulation, advertising and accounting functions. All employees of the two newspapers, with the exception of the editorial staffs, were shifted to the consolidated operation (Tr. 55, 144) which was described as the Honolulu Star-Bulletin, Inc., and the Advertiser Publishing Co., Ltd., d/b/a Hawaii Newspaper Operators (hereinafter referred to as HNO). An entity, Hawaii Newspaper Agency, Inc., (HNA) with three management employees, was formed to direct the common facility.

Prior to the 1962 consolidation, Hawaii contacted the Unions and gave them advance notice of the consolidation, preparatory to initiating negotiations concerning the employment conditions for those employees who were to be transferred to work at the new facility. An international representative of the Guild came to Hawaii to carefully analyze the differences between the Star-Bulletin and Advertiser contracts (Tr. 47) and decided that the Union wanted the provisions of the 1961 Star-Bulletin agreement to govern the consolidated unit, because it contained superior benefits (Tr. 50). An interim agreement was reached, which, in effect, simply extended the 1961 Star-Bulletin contract over to the Advertiser employees working at HNO (Resp. Exh. 3). Although there was no discussion during these negotiations regarding Section 12(a) of the contract it, as well as every

other clause in the Star-Bulletin agreement, was specifically agreed to by the international representative of the Guild (Tr. 100-101).

Upon the formation of HNO in June, 1962, and the execution of the interim agreement, the prior long-term Advertiser bonus was discontinued, as was a Sunday bonus plan which the Star-Bulletin had been running.[1/] These plans were eliminated because the consolidation eliminated their value (Tr. 101-102).

No protest from Union officials or employees followed these actions (Tr. 103). Roy Kruse, the Guild President, testified that he interpreted a company notice posted about the time of the consolidation (not placed in evidence) as stating that new bonus plans would be promulgated by the company, supposedly retroactive to June 1, and supposedly paying the same amount of money as did the recently discontinued plans (Tr. 28, 37). However, no evidence was presented and the Trial Examiner did not find that the Sunday Star-Bulletin plan supplied covered employees with compensation comparable to that the Advertiser Quarterly Bonus Plan, based as it was on six days a week, provided for its

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1/ Although the Star-Bulletin was the stronger of the two newspapers, the Sunday edition was a recent innovation and the Advertiser was dominant on that day. Therefore, the Star-Bulletin limited its bonus plan to lineage sold in the Sunday paper (Tr. 102).

employees (R. 14, lines 20-23).

4. Events Subsequent to the Consolidation

No new bonus plans were promulgated by the company in the summer of 1962 and it was not until September 19 that the advertising director of HNO initiated a plan for advertising lineage sold by the Saturday Star-Bulletin and the Monday Advertiser. This bonus plan was not retroactive to June 1 and did not pay amounts equal to what the Star-Bulletin employees had received prior to the consolidation, let alone what the Advertiser employees had previously enjoyed. Again, the Union did not react to the company's behaviour and although Union President Kruse testified he asked about retroactivity, he did not protest any aspect of the company's action (Tr. 30-33). This Saturday-Monday plan only benefited one or two individuals and thus was deemed a failure (Tr. 30, 91-92).

No other bonus plans were applied to advertising salesmen working at HNO through 1962. However, at the end of that year, the joint facility announced a new plan, referred to as a Monthly Team Bonus. The notice containing the plan's details specifically stated that it

> "...may be revised or discontinued at any time even though the present objective is to make this effective for the first four months of 1962." (Resp. Exh. 2)

5. 1963 Negotiations

In the Spring of 1963, the parties negotiated for a new collective bargaining agreement to follow the interim agreement which was to expire March 31. Negotiations collapsed and the Union struck from June 22 through August 2 (R. 15, Tr. 108). A strike settlement agreement presumably settling all matters in dispute was signed on the latter date (Tr. 108).

The newspapers discontinued operations during the strike and as a result advertising customers upon resumption of operations were "hungry." It was thus deemed unnecessary to continue the monthly team bonus plan and the Saturday-Monday plan (Tr. 90-92). Accordingly, on August 5, HNO notified the advertising salesmen that both the Saturday-Monday and Monthly Team Bonus plans were "no longer in effect." The notice included the statement "new plans will be presented as soon as possible" but did not specify what kind of plans, how much money they would yield, or how long they would be in existence (R. 15, G.C. Exh. 4). Other bonus plans were, in fact, promulgated, including a new Christmas gift guide bonus.[1/] The Union did not dispute the company's right to discontinue these plans (Tr. 16,

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1/ The Trial Examiner found (R. 16, lines 34-38) that the Christmas bonus was the only bonus plan instituted subsequent to August 5. This finding simply does not square with the testimony (Tr. 92-93).

44, 56-57, 78, 107-108).

Although the strike settlement agreement was signed August 2, the actual collective bargaining agreement was not executed until October 31, 1963. During the period between the execution of these documents, the Union did not seek to modify the collective bargaining agreement with respect to bonuses (Tr. 106-107). The subject of bonuses was not brought up by either party in the 1963 negotiations for a new collective bargaining agreement (Tr. 16, 44, 78). No official Union proposal regarding the reinstitution of bonus plans was brought to Brandt's attention between August 5, and October 31, 1963, the date when the new collective bargaining agreement was signed (Tr. 107-108), even though Brandt saw Union President Kruse nearly every day during that period (Tr. 61). Once again the Union assented to the inclusion of Section 12(a) in the collective bargaining agreement (Tr. 100). Kruse, one of the Union negotiators, testified that there was no need to negotiate about the subject of bonuses because the company had "promised" in the notice of August 5, 1963, announcing the discontinuance of the existing bonus plans that new plans were to be presented and further that the Union felt there was no need to negotiate bonuses because they were a part of the employees' basic benefits (Tr. 16, 56).

During the period of negotiations Kruse, acting as a member of a volunteer group (Tr. 59), questioned his immediate supervisor, Roy Nelson, advertising manager, about the possibility of new bonus plans, but he was given no assurance as to when new bonus plans would come in, if they were to come in, or what form they would take. He was told by various members of management, including Nelson and Carl Barrea, advertising director, that "they did not have time to develop new ideas concerning the bonus plan" (Tr. 58). Company officials during this period prior to the final execution of the new agreement, affirmed to Kruse the company's right not to bargain about the plans (Tr. 59), and affirmed that Mr. Brandt, the general manager, would not accept the plans which Kruse's volunteer group suggested (Tr. 60). Brandt indicated in this period that if the company were to accept incentive plans, they would have to cover all employees, not just advertising salesmen (Tr. 61).

6. The Alleged Refusal to Bargain

On January 2, 1964, Kruse, accompanied by another Union official, Mr. Lum, went to Mr. Brandt to inquire about the likelihood of reinstitution of the bonus plans (Tr. 20, 67-68, 79). Later, specific demands to bargain regarding reinstitution of

the discontinued incentive bonuses were made to the company and were rejected.

7. The Trial Examiner's Decision

The Trial Examiner found that the Respondent had refused to bargain from October 1, 1963, because a reasonable construction of the collective bargaining agreement, while necessarily implying Respondent's right to reduce bonus payments or terminate specific bonus plans during the contract's term, did not in and of itself show any clear and unmistakable relinquishment of the Union's statutory right to bargain with respect to the development and promulgation of bonus plans or the correlative right of Union spokesmen to be heard with respect to their proposed modification or discontinuance (R. 19, L. 3-11). The Trial Examiner also found that the evidence could not justify a finding that the representatives of the parties, during their 1963 contract negotiations, fully discussed or consciously explored management's claim of prerogative with respect to the promulgation or termination of bonus plans and that Union spokesmen consciously yielded or clearly and unmistakably waived their constituency's interests with respect to such plans. On this basis the Trial Examiner found no waiver of the Union's

statutory right to insist upon bargaining with respect to the reinstitution of bonuses (R. 19-20).

Upon review the Board upheld all the findings, conclusions and recommendations of the Trial Examiner with the exception that the Board refused to adopt the Trial Examiner's conclusion that Respondent's refusal to bargain about the bonus began as of October 1, 1963. Instead, the Board found that the refusal to bargain initially occurred on January 2, 1964, and continued thereafter (R. 30). The Board's order affirmatively requires the company to bargain upon request with respect to the formulation and reinstitution of incentive bonus plans for its employees and to post appropriate notices (R. 23-24).

SUMMARY OF ARGUMENT

The NLRB has held that Respondent violated 8(a) (5) of the NLRA by refusing to bargain regarding the reinstitution of bonus plans it had discontinued as well as the formulation of new plans.

Respondent's defense to the petition for enforcement is the wording of its collective bargaining contract which it claims sanctioned the refusal to bargain as well as its right to discontinue the plans.

Alternatively, Respondent relies upon this Court's decision in NLRB v. C&C Plywood Corp., 351 F.2d 224, for the proposition that the Board lacked jurisdiction in this case.

ARGUMENT

I.

THE RESPONDENT'S REFUSAL TO ACCEDE TO THE UNION'S DEMAND TO BARGAIN OVER THE REINSTITUTION OF THE TERMINATED BONUS PLANS OR THE FORMULATION OF NEW BONUS PLANS IS SANCTIONED BY SECTION 8(d) OF THE NATIONAL LABOR RELATIONS ACT.

1. The Board's Waiver Doctrine Is Inappropriately Applied

The Board has brought a wholly inapplicable standard to its analysis of this case. Respondent relies upon its collective bargaining agreement and asserts that Section 8(d) of this Act protects its refusal to bargain with the Union over the reinstitution of old or formulation of new bonus plans.[1/] The Board, by contract, treats this case as if the contract were silent and Respondent's defense was based on an alleged oral waiver by Union officials of the right to bargain over bonus plans. Thus, the Trial Examiner held that the Union did not

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1/ Section 8(d) "...and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

"consciously" yield or "clearly and unmistakably" waive its right to bargain with respect to bonus plans (R. 18-21). The Board, adopting the Trial Examiner's decision, adds the adjective "unambiguously" to "clearly and unmistakably" (R. 30). It is respectfully submitted the Board has no warrant to formulate this unusually stringent standard for the interpretation of collective bargaining agreements which actually results in shifting the burden of proof on to the Respondent.[1/]

The entire argument presented on pages 11 through 20 of the Board's Brief is totally inapposite since it deals with the Board's waiver doctrine as applied to situations where the collective bargaining agreement is silent on the subject proposed for bargaining. Whatever may be the justification for imposing such a heavy burden upon an employer who seeks to assert a Union waiver of its right to bargain based on negotiation history, there is no reason to apply this standard to the interpretation of collective bargaining agreements.

The Board rationalizes its "waiver doctrine" on the grounds that a less stringent standard would result in the reluctance of contracting parties to discuss matters during

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1/ The burden, furthermore, is analogous to beyond a reasonable doubt which, applied to a defendant is an ironic twist.

negotiations (Pet. Br. pp. 14-16). This rationale has no meaning here since we are faced with an interpretation of language which the parties agreed upon and did place in the contract. The Board's Brief further points out to the Court the general advantages of a continuing collective bargaining process. Surely the Board does not imply that it seeks to "reverse" Section 8(d) of the National Labor Relations Act which enunciates an opposite policy with respect to bargaining which would modify collective bargaining agreements during their term. Indeed, national labor policy clearly supports the use of grievance procedures and arbitration as the proper continuation of collective bargaining with respect to matters covered in an existing contract. United Steelworkers v. Warrior & Gulf Naviagation Co., 363 U.S 574 (1960).

If this case represents an attempt by the Board to extend its waiver doctrine to the interpreation of contract language it is without prior judicial support. In fact, the only cases which the Board relies upon to sanction its "clear and unmistakable" standard as applied to contract interpretation are: Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (6th Cir. 1963); NLRB v. Otis Elevator Co., 208 F.2d 176 (2nd Cir. 1953); NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955); Tidewater Associated

Oil Co., 85 NLRB 1096 (1949) (Pet. Br., p. 22).

Actually, Timken and the Item case cited by the Timken court both involved contracts which were silent on the crucial issue. The Respondent in those cases claimed that the Unions had waived their right to bargain over the matter because the Union had dropped a proposed clause during negotiations. Although in Otis the company relied upon a contract clause to justify its refusal to give the Union certain information on the grounds that the clause occupied the field, in fact, the obligations set forth in the clause were clearly not inconsistent with the requested information. The Tidewater case decided in 1949 appears to be the original source of the Board's "clear and unmistakable" doctrine as applied to interpretation of a contract. The Board did not in that case, however, hold that the contract clause itself had to present a "clear and unmistakable" waiver[1/] and indeed, the same Board shortly thereafter indicated in Standard Oil Co., 92 NLRB 227 (1950), that a "clear and unmistakable" waiver is reflected by a "reasonable construction" of contract language (at 228).

1/ In that case, the employer did not rely upon its contract in refusing to bargain.

Thus, the Board has recognized that if an employer's refusal to bargain is predicated on a reasonable construction of the contract it would be unjust to hold him guilty of an unfair labor practice. If the Board were to consistently apply this standard which it has never overruled, it would not be faced with the "problem" which seems to underlie its disagreement with this Court's decision in Square D Co. v. NLRB, 332 F.2d 360 (9th Cir. 1964), and NLRB v. C & C Plywood Corp., 351 F.2d 224 (9th Cir. 1965), the danger that an arbitrator might interpret the contract differently from the Board (Pet. Br., p. 31). In contrast to this case and C & C Plywood, the Board has in other cases seemed to follow the analysis foreshadowed in the Standard Oil decision. Leroy Machine Co., Inc., 147 NLRB 1431 (1964), Borden Co., 110 NLRB 127 (1954), and Buick-Oldsmobile-Pontiac Assembly Division of General Motors, 149 NLRB 40 (1964).

2. The Plain Meaning of the Contract Supports Respondent's Refusal to Bargain Over the Discontinued Bonus Plans.

Whatever standard is applied to the instant case it is respectfully submitted that the contract amply justifies Respondent's refusal to bargain over bonus plans.

The agreement in effect at the time of the alleged refusal to bargain contemplated payments to employees of amounts

in excess of the minimum salary schedule solely at the discretion of the employer. The last sentence of Exhibit A reads:

> "Nothing in this agreement shall limit the right of the employer at its discretion to pay amounts in excess of the salary set forth above." 1/ (Emphasis added)

Although HNO was granted this right as well as the right to bargain individually with employees for salary increases [12(b)], the employees were partially protected against reduction of their total income by Section 12(a):

> "There shall be no reduction in the present salary of any employee covered by this agreement. The term 'present salary' is understood to mean the straight time weekly salary being paid for a work week of forty (40) hours and does not include any payments for overtime or bonus or any other extra payments."

Exhibit A's last sentence grants to Respondent plenary authority concerning the institution of any payments to employees above minimum salaries. The word "amounts" must refer to bonuses as well as increases in salaries since when the parties meant to limit the operation of contract language to salaries they specifically did so:2/

1/ This sentence was not specifically urged upon the Board but the whole collective bargaining agreement is in evidence.

2/ It is expected that the Board in its Reply Brief will claim that the last sentence of Exhibit A deals only with individual bonuses and not group plans since an analogous clause was so interpreted in C & C Plywood, 148 NLRB 414, 417; however, there the clause referred to "individual" premium pay

"(b) Nothing in this agreement shall prevent employees from bargaining individually for salary increases in excess of the minimum established herein." 1/ (Emphasis added)

Section 12(a) although freezing past salary increases, contains a grant of even greater management right over bonuses since it, by excluding bonus from the definition of present salary, allows the Respondent to discontinue bonus plans at will. It would have been understandable had the parties treated bonuses in the same manner as salary increases, i.e., allowing management to increase bonuses at its discretion but forbidding decreases below the level employees enjoyed upon execution of the agreement. Instead, 12(a) indicates that the Union either regarded bonuses a less essential aspect of total compensation or that it agreed with management as to the practical necessity of allowing Respondent free rein concerning this matter. The use of the adjective "extra" to describe bonuses reinforces this interpretation.

The Star-Bulletin's collective bargaining agreement which preceded Respondent's Exhibit 4 contained the same language as the instant HNO agreement. The Advertiser contract on the other

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1/ Obviously, the parties considered individual bargaining as appropriate only for salary increases and not for bonuses.

hand, differed in that bonuses were not defined as extra payments and were obviously regarded by the parties as part of the advertising salesmen's "present salary," thus the Advertiser would not have been entitled to reduce or terminate the Quarterly Bonus plan which provided over a long period of time a significant amount of the advertising salesmen's income.[1/] The same Union, indeed the same officials (Tr. 27-28, 35, 47-48), were involved in the negotiations of both the Advertiser and the Star-Bulletin agreements. They must then be read in paria materia and their differences granted the significance they obviously deserve.

The Board, although appearing to concede that 12(a) of the agreement grants Respondent the right to terminate bonuses, denies that this right includes the privilege of refusing to bargain over the reinstitution of the bonus plans

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1/ Even the Advertiser presumably would have been entitled to refuse to discuss the promulgation of new plans since its agreement (Resp. Exh. 1) also stated, "...nor shall any provision herein limit the right of the Publisher to pay amounts in excess of the minimums set forth herein."

once discontinued.[1/] This is so because "the contract does not contain any express waiver of the Union's right to bargain about bonuses" (Pet. Br., p. 21, R. 18-19). Again, it is submitted that the Board's reasoning is faulty resulting in an artificial dichotomy. Few labor contracts contain express waivers concerning subjects discussed therein, yet a party is entitled to refuse to discuss matters brought up during the life of the agreement if the discussion involves matters which, if agreed to, would result in the modification of the contract. Thus, a contract containing a wage scale does not normally include a written statement to the effect that the Union waives its right to bargain about wages during the life of the agreement but the employer is privileged to refuse to discuss wages for classifications embodied in the contract because such a discussion necessarily involves a prospective change in the

1/ The Board's Brief states that "Section 12(a), at most, frees the Respondent of any contractual obligation to maintain bonuses throughout the contract period" (Pet. Br., p. 21), and that "...a claim that the contract entitles employees to bonuses would clearly be rejected [by an arbitrator] on the merits..." (Pet. Br., pp. 30-31). The Trial Examiner interpreted the contract as granting the right to terminate bonus plans but not the right to do so unilaterally (R. 19). The Board's Brief makes no attempt to defend this fantastic interpretation.

contract. The proper question then is: did the Union's request actually involve a discussion pointing to a modification of the agreement?

The Board's restrictive interpretation of the contract, at least as articulated in its Brief, is based on three observations (Pet. Br., pp. 21-24). One of these is that although overtime is excluded from the definition of present salary in 12(a), another section specifies that if overtime was provided, it would be paid at one-and-one-half (1 1/2) times the basis straight hourly wage. The Board argues that since the parties dealt with overtime elsewhere in the contract, 12(a) could not have constituted a grant of management prerogative concerning overtime. But Section 10(c) read with Section 12(a) indicates that the former is no more than a provisio, and a limited one at that, since it simply repeats obligations set forth under the Fair Labor Standards Act.[1/] Notwithstanding 10(c), 12(a) clearly grants to the employer the right to eliminate overtime altogether and thus a Union demand to bargain about more overtime would be properly rejected as was the

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1/ See 29 U.S.C. Section 207(a)(1)

demand to bargain about more bonuses. Secondly, the Board contends that the contract contains no identified quid pro quo in exchange for the Union's relinquishment of its right to bargain over the reinstitution of bonus plans legally discontinued (Pet. Br., p. 23). This reflects an extremely naive view of the collective bargaining process. Surely any one versed in collective bargaining negotiations or, indeed, negotiations for any contract, realizes that everything one party gets in the contract is a quid pro quo for everything received by the other party.[1/] The only possible explanation for this argument is an underlying Board view that the Union should not have granted this right to the employer without getting for its members some bonus plan benefit. The United States Supreme Court, however, has forbidden the Board to exercise this kind of judgment as an adjunct to its decision-making process:

> "Thus, it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statements in support of

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1/ The no-strike clause and arbitration provisions are often paired only because one makes little sense without the other.

> his position. And, it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." NLRB v. American National Insurance Co., 343 U.S. 395, 404 (1952).

The Board also insists (reflecting the Trial Examiner's reasoning) that the contract cannot be interpreted in the manner Respondent urges since there is no evidence that either party specifically stated in negotiations that the contract clauses involved were meant to "waive" the Union's right to bargain about bonus plans (Pet. Br., p. 22, R. 19). Actually, since waiver is an inappropriate word to apply, it is not surprsing that no such evidence was produced. In any event, although Respondent asserts the plain meaning of the contract, the conduct of the parties prior to and after the execution of the collective bargaining agreement reflects their common interpretation.

To return to the determinative question: does the Union's request to bargain over the discontinuance of old plans and the institution of new ones necessarily involve discussion of the modification of contractual terms? Respondent asserts that it does.

It seems self-evident that the last sentence of Exhibit

A[1/] grants a great measure of discretion to Respondent which would be restricted by any obligation to bargain over the formulation of new bonus payments. Any such restriction whether ordered by the Board or bargained by the Union obviously modifies this contract provision. Furthermore, 12(a) by itself, even as construed by the Board, contains a necessary grant of sole authority over new plans and would similarly be modified by the Board's order. The greater power of termination, which is conceded, necessarily implies the lesser authority of formulation. Compare Leroy Machine Co., Inc., 147 NLRB 1431 (1964), where the Board decided that a contract clause which granted to the employer the sole right to determine an employee's qualifications encompassed the lesser right to give physical examinations.

The Board's order vividly illustrates this principle by requiring the employer to bargain over the very plans he legally discontinued. Surely if a contract grants the employer the right to abolish the bonuses, the Board's order conflicts

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1/ "Nothing in this agreement shall limit the right of the Publisher, at its discretion, to pay amounts in excess of the salaries set forth above."

directly with the contract. It is inconceivable that when Section 12(a) was negotiated the Union agreed to grant the employer the power to abrogate bonus plans but reserved the right to immediately thereafter bargain about the reinstitution of the same plans. Such a contractual interpretation is utterly unreasonable.

A direct conflict between the Union's bargaining demand and the Board order on the one hand and the agreement on the other is further illustrated by the following example: Assume that the employer is obliged pursuant to the order to bargain with the Union regarding a bonus plan. The parties negotiate for several months and the Union, through the auspices of a strike threat, forces the company to agree to a new bonus plan.[1/] The Union would have the unquestioned right pursuant to Section 8(d) of the Act to insist that the agreed-upon bonus plan be incorporated into the collective bargaining agreement.[2/] This cannot possibly be reconciled with the company's

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1/ It is not at all clear that the no-strike clause in the collective bargaining agreement would prohibit such a strike, since it is arguable that it applies only to matters already bargained.

2/ "For the purpose of this section, to bargain collectively means the negotiation of an agreement, or any question arising thereunder, and the inclusion of a written contract incorporating any agreement reached if requested by either party,..." [Section 8(d)].

conceded right to revoke the bonus plan.

If, in the light of this paradox, the Board order does not require the written incorporation of any bonus plan agreement, then the obligation to bargain about discontinued or new bonus plans is meaningless since Respondent would be entitled to revoke any plans at his discretion. If this is so, to force discussion of the plans is capricious.

3. Respondent's Interpretation of the Meaning of the Collective Agreement is Supported by the Parties' Conduct

It is a well-settled rule that, in interpretation of a contract clause which is arguably susceptible to more than one meaning,[1/] the Court will place great weight upon conduct of the parties before the controversy arises which indicates the meaning they have placed upon the clause. 4 WILLISTON ON CONTRACTS, §623 (1961 ed.). This Court has applied the above rule in several cases to interpret contractual provisions. In Pacific Portland Cement Co. v. Food Machine & Chemical Corp., 178 F.2d 541, this

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1/ Respondent does not, of course, concede that the contract is susceptible to any meaning other than that advanced in this brief.

Court said, at 554:

> ...the conduct of the parties subsequent to the execution of the contract and before the controversy arose... is given due consideration in determining the meaning of a contract, because it may indicate the actual, practical construction which the parties have placed upon the contract." (9th Cir. 1949)

See also Continental Assurance Co. v. Conroy, 209 F.2d 539, 542-543 (3rd Cir. 1954); Pekovich v. Coughlin, 258 F.2d 191, 193 (9th Cir. 1958). The rule has been applied in the labor-management field to construe an arbitration submission pursuant to a collective bargaining agreement, United Steelworkers v. Northwest Steel Rolling Mills, Inc., 324 F.2d 479, 482 (9th Cir. 1963).

Assuming, arguendo, that in the instant case the collective bargaining agreement is susceptible of more than one interpretation evidence regarding the parties' conduct since 1956 is relevant in interpreting its meaning.[1/] This evidence indicates clearly that prior to the instant controversy both parties

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Third, the notice distributed to advertising employees in February, 1963, which described Respondent's new Monthly Bonus Plan, contained the statement that the new plan might be "revised or discontinued at any time."[1/] The Union at no time challenged management's right to revise or discontinue this plan (R.21).

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In spite of the above evidence, the Trial Examiner rejects Respondent's contention that management's position regarding its rights under the collective bargaining agreement was known to the Union. It is submitted that this finding is not based on substantial evidence and must be disregarded by the Court. In light of the Union's conduct in this case the fact that the question of bonuses was not discussed in negotiations simply indi-

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THE BOARD HAS NO JURISDICTION TO ENTERTAIN THIS CASE IN THE ABSENCE OF AN ARBITRATOR'S INTERPRETATION OF THE CONTRACT.

The contract (G.C. Exh. 2) contains a grievance procedure which culminates in arbitration.[1/] This Court has recently held that where an unfair labor practice is predicated on interpretation of a collective bargaining agreement, the Board must await an arbitrator's decision (or a Court's if no arbitration clause exists). NLRB v. C & C Plywood Corp., 351 F.2d 224 (9th Cir. 1965) Square D Co. v. NLRB, 332 F.2d 360 (9th Cir. 1964). See also, Sinclair Refining Co. v. NLRB 306 F.2d 569 (5th Cir. 1962). Presumably then the issue is foreclosed here.[2/] The arguments presented by the Board in its Brief urging reconsideration of this Court's view of the problem were undoubtedly raised in the C & C Plywood case, and the Respondent does not wish to tax the Court with a reargument of the same issue. Suffice is to say that the two decisions on which the Board primarily relies, Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1965) and Smith v. Evening News Association, 371 U.S. 195 (1962), did not involve cases

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There remains the question as to whether the charging party in this case could have presented to an arbitrator the very issue which the Board decided. The Board contends in its Brief that the Union would not have been entitled to present the "statutory question" to the arbitrator. It is respectfully submitted that again the Board indulges in a sophistic split of what, in fact, is one issue. The Union would certainly have been entitled to test the company's position in arbitration by alleging that Respondent's refusal to bargain over the reinstitution of bonus plans was a specific violation of Section 1 of the agreement:

> "Section 1. UNION RECOGNITION AND UNION SECURITY. The employer recognizes the Guild as the sole and exclusive collective bargaining agent for all employees covered by this agreement."

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The Board's argument on this issue does contain one point which Respondent is willing to concede. If the Board continues to use its extraordinary waiver standard in interpreting collective bargaining agreements there will undoubtedly be a high "risk of conflict" between Board and arbitration decisions (Board's Brief, P. 31). This risk would be minimized if the Board were not to issue a complaint in such a case as this if the party asserting the right not to bargain points to a reasonable or arguable interpretation of its agreement. Indeed, the

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Respondent is further willing to concede that had this case been presented to an arbitrator a conflicting decision would have resulted. This is precisely the reason why the Respondent is not guilty of an unfair labor practice.

Court said, at 554:

> ...the conduct of the parties subsequent to the execution of the contract and before the controversy arose... is given due consideration in determining the meaning of a contract, because it may indicate the actual, practical construction which the parties have placed upon the contract." (9th Cir. 1949)

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CONCLUSION

This case turns on the interpretation of a contract. Therefore, this Court is faced with a traditional question of law over which the Labor Board can assert no special expertise. If the Court agrees with Respondent's interpretation, the Board's petition for enforcement must be denied and there is no necessity to wait for the Supreme Court's decision in C & C Plywood.

It is respectfully submitted that any reasonable construction of the collective bargaining agreement justifies Respondent's action; it did not violate the National Labor Relations Act.

Respectfully submitted,

LAURENCE H. SILBERMAN and
RICHARD A. WILLIAMS

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Of Counsel

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sections 151, et. seq.) are as follows:

RIGHTS OF EMPLOYEES

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

UNFAIR LABOR PRACTICES

Section 8(a). It shall be an unfair labor practice for an employer ---

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).....

Section 8(d). For the purposes of this section to bargain collectively is the performance of a mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall terminate or modify such contract,unless the party desiring such termination or modification ---

(1) serves a written notice upon the other party to the contract of the proposed termination or modification

sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract whichever occurs later.

Section 10. (e) The Board shall have power to petition any court of appeals of the United States,...within any circuit...wherein the unfair labor practice in question

occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to makeand enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional

evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, the court may order such additonal evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record....Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the...Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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Section 24. GRIEVANCE PROCEDURE. When any employee covered under the terms of this agreement or when the Guild believes that the Employer has violated the express terms and conditions thereof, and that by reason of such violation his or its rights arising out of this agreement have been adversely affected, he or it, as the case may be, shall be required to follow the procedure hereinafter set forth in presenting the grievance and having the grievance investigated and the merits thereof determined.

First--The grievance in the first instance shall be presented to his immediate supervisor within fifteen (15) days of the alleged breach of the express terms and conditions of this agreement.

Second--If the immediate supervisor does not adjust the grievance to the complainant's satisfaction within three (3) days, such grievance shall then be presented in writing to the advertising director (in the case of the advertising department) or to the general manager or his designated representative (in the case of employees covered by Unit No. 3).

Third--If the grievance is not resolved to the satisfaction of the complainant by the advertising director or the general manager or his designated representative within three (3) days, the grievance may be submitted to final and binding arbitration by either party.

The Guild may designate a committee of its own choosing to take up with the Employer or his authorized agents matters not covered specifically under this agreement affecting the relations of employee and Employer; however, such grievance shall not be subject to arbitration.

Arbitration Procedure. Within forty-eight (48) hours after either party demands that the grievance be submitted to arbitration, duly appointed representatives of management and the Guild shall meet to determine the selection of an arbitrator, as follows:

Guild and management shall each submit two (2) names of possible arbitrators. These shall then select the fifth member of the panel. Then one (1) arbitrator shall be chosen as follows:

Each party may strike two (2) names from the panel and the remaining arbitrator shall serve in the case. All decisions of the arbitrator shall be limited expressly to the terms and

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provisions of this agreement, and in no event may the terms and provisions of this agreement be altered, amended, or modified by the arbitrator. The arbitrator shall receive for his services such remuneration as, from time to time, shall be acceptable to him and agreed upon by the parties. All decisions of the arbitrator shall be in writing and a copy thereof shall be submitted to each of the parties hereto. All fees and expenses of the arbitrator shall be borne equally by the Guild and the Employer. Each party shall bear the expenses of the presentation of its own case.

The complainant in every hearing before the arbitrator shall present a prima facie case. In general, judicial rules of procedure shall be followed at every hearing, but the arbitrator need not follow the technical rules of evidence prevailing in a court of law or equity. The arbitrator shall make his decision in the light of the whole record and shall decide the case upon the weight of all substantial evidence presented.

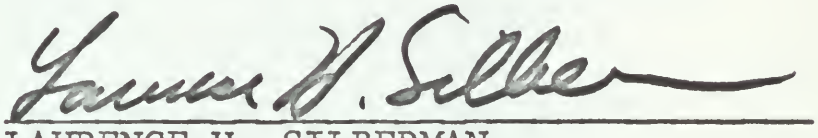
A court reporter shall be present and record the proceedings. A transcript of the proceedings shall not be required in formal hearings except in cases where the parties agree it should be made. Either party may, at its own expense, furnish a transcript to the arbitrator without the consent of the other party; provided, however, that the other party shall be entitled to a copy of the transcript or access to the original transcript by agreeing to pay one-half (1/2) of the total transcript cost.

The parties may, by mutual agreement, request the arbitrator to conduct an informal hearing. An informal hearing shall mean a hearing without a reporter being present to transcribe the testimony of witnesses and arguments by representatives of the parties, but in all other respects the foregoing provisions of this subsection shall be applicable. In the case of an informal hearing, the decision of the arbitrator shall be limited to a written statement of his conclusion, without comment on the evidence or statement of the reasons therefor.

All decisions of the arbitrator under this subsection, including decisions following informal hearings, shall be final and binding upon the parties.

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



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